United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1761

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

P/S

UNITED STATES OF AMERICA,
Appellee,

vs.

KEITH HALBACH,
Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK
CR. 1973-307.

BRIEF FOR THE APPELLEE

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VS.

KEITH HALBACH,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK
CR. 1973-307.

BRIEF FOR THE APPELLEE

Preliminary Statement

On September 13, 1973, a federal Grand Jury sitting in the Western District of New York returned a five-count indictment against the appellant and a co-defendant, Jack E. Gilmet (App. 1). Both defendants were charged in Count I of the indictment with conspiracy to utter and publish as true certain forged United States Savings Bonds. Counts II, III and IV of the indictment charge the appellant alone with forging the endorsement of Richard C. Yox, on three separate United States Savings Bonds, each with a face amount of $1,000, "for the purpose

of obtaining and receiving a sum of money from the United States and its agents" in violation of Title 18, United States Code, § 495.[1] Count V charges that the appellant, alone, "did utter and publish as true a forged United States Savings Bond . . . with intent to defraud the United States, knowing the same to be forged", also in violation of § 495.[2]

Upon motion by both defendants to suppress certain written statements furnished by both defendants to special agents of the United States Secret Service, a suppression hearing was held before the Honorable John T. Curtin on January 7 and 15, 1974. At the conclusion thereof Judge Curtin denied the motions.

The trial of the defendant Halbach was held before the Honorable Lloyd F. McMahon on April 29 and 30, 1974 at Buffalo, New York. The jury found the defendant Halbach guilty on all five counts of the indictment. Judge McMahon sentenced the defendant Halbach as a youthful offender on each of Counts I through V concurrently, pursuant to Title 18, United States Code, § 5017(c) (App. 46). The defendant Halbach now appeals.

On February 19, 1974, the defendant Gilmet entered a plea of guilty to Count I of the indictment and was sentenced by Judge Curtin to three years probation.

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[1] The applicable paragraph of § 495 reads as follows:

"Whoever falsely makes, utters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract or other writing, for the purpose of obtaining or receiving, or of enabling any other person either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money . . . shall be fined not more than $1,000 or imprisoned not more than ten years, or both".

[2] Whoever utters or publishes as true any false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited . . . shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

Statement of Facts

On August 9, 1973, while residing at the home of Richard C. Yox, in Buffalo New York, the defendant, KEITH HALBACH stole six United States Savings Bonds belonging to Mr. Yox from a small safe in the basement of the home (Tr. 59). Halbach told the defendant JACK GILMET what he had done and asked Gilmet's aid in cashing the bonds (Tr. 62, 63). Gilmet agreed and drove Halbach to a bank in the area where Halbach opened a savings account in the name of Richard C. Yox, and then forged the endorsement "Richard C. Yox" on one of the $1,000 Series E United States Savings Bonds (Tr. 33-36). Halbach presented the bond to a teller at the bank for payment and received therefor $1124.80 in cash, a portion of which he was required to deposit in "his" newly opened account (Tr. 37). Halbach then rejoined Gilmet in the latter's automobile and Gilmet drove the two of them to another bank in the vicinity, where Halbach forged the endorsement "Richard C. Yox" on additional two savings bonds, each with a face value of $1,000 (Tr. 60). When the second bank refused to cash these bonds, Halbach reported this fact to Gilmet who then drove both of them to the bank where Halbach had earlier success in cashing one bond (Tr. 59). When Halbach presented these two bonds for payment, the bank manager's suspicions were aroused (Tr. 38). He took the two forged bonds from Halbach and called a Richard C. Yox whose number was listed in the Buffalo telephone book (Tr. 39). Sensing that he was about to be caught, Halbach fled the bank and returned to Gilmet's waiting automobile outside the bank (Tr. 59). The two individuals then drove to another bank where Halbach withdrew the money he was required to deposit earlier that day when opening the account in the name of

Richard C. Yox (Tr. 73). Halbach and Gilmet then divided the proceeds from the bonds approximately equally (Tr. 74).

Several days later, both defendants admitted these deeds to special agents of the United States Secret Service, and signed written confessions. Halbach's statement was introduced at trial (Tr. 53). Gilmet testified against Halbach as a witness for the government (Tr. 54-62). Halbach testified at trial as the only defense witness and admitted that he had stolen the bonds, enlisted the aid of Gilmet in cashing them, forged the endorsements of the rightful owner, presented to bank personnel for payment three of the bonds and received approximately $1100 in return (Tr. 65-74). However, he denied any knowledge that the United States government was "involved" (Tr. 68).

Questions Presented

1. Did the District Court improperly restrict the direct examination of the defendant on the issue of his intent?

2. Did the District Court properly instruct the jury on the issue of intent?

3. Was the evidence sufficient to sustain the defendant's conviction on Count I (conspiracy) and Count V (uttering and publishing)?

ARGUMENT

POINT I

The district court did not improperly restrict the direct examination of defendant on the issue of intent.

Contrary to the appellant's assertion that the trial court excluded some testimony of the defendant with respect to his intent at the time the offenses were committed, the record clearly indicates that the court permitted the defendant to answer every question asked of him on direct examination by his defense attorney (App. 65-74). While Judge McMahon indicated that he would instruct the jury that the defendant need not have known that he was violating a federal law in order to possess the requisite intent under the statutes, nevertheless, the defense attorney was allowed to ask, and the defendant answered, all questions posed. Specifically, Judge McMahon told Mr. Hill that "If you want to ask him, with full knowledge that I am going to so charge the jury, go ahead". (App. 21). The following questions were asked by Mr. Hill and answers given by the defendant:

> Q. Did you know that there was a separate Federal law covering the situation?
> A. No, I didn't.
> Q. Do you know that the government was involved in any way?
> A. No.
> Q. When did you learn that the government was involved?
> A. Well, after I ran from the Buffalo police, I called back home to talk to my brother, and he informed me that the Secret Service people were looking for me. (App. 21-22)

. . .

Q. Now, before you learned that the government was involved, in your own mind how did you look at what you had done?

A. I just thought I was taking money from Richie.

Mr. Hill: Thank you, no further questions. (App. 22-23)

The case cited by appellant in support of his position, *Haigler v. United States*, 172 F.2d 986 (10th Cir., 1949), is not on point. *Haigler* involved a prosecution for tax evasion in which the district court sustained objections "to repeated efforts of counsel to show the appellant's understanding of his tax liability for the transactions involved" at 988. While defense counsel in *Haigler* was attempting to elicit from the defendant testimony that his acts were undertaken in good faith and performed innocently, no such blameless motive is urged upon this court by appellant. Moreover, the "repeated efforts" of appellant's attorney were far more successful than the counsel in the *Haigler* case inasmuch as Judge McMahon permitted the defense attorney to develop the point that, while appellant knew he may have been violating a state or local law, he did not realize he would be violating a federal law in forging and cashing the bonds. Therefore, the jury certainly had the benefit of all the evidence which the defense attorney sought to present on this point. As the court stated in *Walker v. United States*, 342 F.2d 22, 27 (5th Cir., 1965), *cert. denied* 382 U.S. 859,

> When the defendant aided and abetted the forgery of the endorsement on the check described in each count, his purpose was to obtain a sum of money. While it was true that he would receive the money initially from whoever cashed the Treasury check, he was charged with knowledge that the United States would suffer the ultimate loss. Since the defendant is presumed to have intended to do what he actually did, it follows that his participation in the crime was

> for the purpose of obtaining money from the United States and the evidence amply supports his conviction on these counts.

Similarly, in a prosecution of a defendant for uttering counterfeit obligations of the United States where the defendant sold counterfeit meal tickets of a commissary, a government agency, the defendant argued that

> the element of the crime or (*sic*) defrauding the government is not proved because he is not shown to have known that the meals and the moneys collected from their sale were government property. As well could it be claimed of a thief stealing government property from a general warehouse, that he did not know it was government property. There is no merit in this contention. A man is presumed to intend to do what he actually does.

Haugen v. United States, 153 F.2d 850, 853 (9th Cir., 1946).

Since the court's instructions on the issue of intent were properly framed and put to the jury, the comments by the Court were not error.

POINT II

The district court properly instructed the jury on the issue of intent required by Section 495.

Counts II, III and IV of the indictment, the forgery counts, require a finding that the defendant forged the bonds "*for the purpose of obtaining or receiving . . . from the United States or any officer or agents thereof . . . any sum of money*" in order to support a conviction. However, Count V, the uttering count, has an essential element that the defendant uttered and published the forged instrument, "*with intent to defraud the United States.*"

The government's proof on this element of Counts II, III and IV consisted of testimony of the bank manager where one bond was successfully cashed that the bank was acting as the agent of the United States in redeeming the bonds (R. 30), the testimony of the bank teller that she cashed the bond for the defendant (R. 42-43), the testimony of the co-defendant Gilmet that it was the common purpose of both defendants to cash the bonds and receive money therefor (R. 59), and, finally, the bonds themselves upon which appeared the words "The United States of America" in a number of places. Moreover, the defendant admitted his purpose in cashing the bonds in the following discussion with the prosecutor:

> Q. What was the purpose for your signing (the bond)?
> A. (No response).
> Q. Was it your purpose to obtain a sum of money?
> A. Yes, it was.
> Q. It was your purpose to obtain a sum of money from whom, from the bank?
> A. Yes, that's where I took the bonds.
> Q. That was your intent, after you turned them over to the bank, the bank would give you some money?
> A. That's right. (App. 24)

. . .

Q. Did you know in your mind that you were doing something wrong when you went in the bank?
A. Yes. (App. 25)

The bank was undeniably acting as the agent of the United States in cashing United States Savings Bonds. The defendant admitted forging the endorsements for the purpose of obtaining a sum of money from the bank. Appellant has cited no authority, nor does any exist, for the proposition that the government must prove beyond a reasonable doubt that the defendant knew of the agency relationship between the bank and the United States. *Tacoronte v. United States,* 323 F.2d 772 (10th Cir., 1963). The government need only establish that the bank was an agent and the defendant intended to obtain from the bank a sum of money.

While the intent language in the forgery paragraph of § 495 ("for the purpose of obtaining or receiving . . . from the United States . . . any sum of money") differs from the language in the uttering paragraph ("with intent to defraud the United States"), the similarities have been occasionally noted. In *Prussian v. United States,* 282 U.S. 675 (1931), the Supreme Court rejected the contention that a forgery indictment under an identical predecessor statute must contain an allegation that the forgery was done with intent to defraud the United States. The court found the statutory requirement satisfied if the forgery was committed for the purpose of obtaining or receiving a sum of money from an officer or agent of the United States. However, the court noted that "this imports an intent to defraud the United States" at 680. Some courts have held that the intent required for the uttering paragraph is separate and distinct, and distinguishable, from the intent required for conviction under the forgery statute. *Leonard v. United States,* 324 F.2d 911 (9th Cir., 1963);

Tacoronte v. United States, supra. Another court has held that "an intent to defraud is part of the crime of forgery", *Miller v. United States*, 397 F.2d 272 (5th Cir., 1968).

This circuit has not directly ruled on the question of whether an intent to defraud is an element of the offense of forgery. However, in *United States v. Sullivan,* 406 F.2d 180 (2nd Cir., 1969), this court discussed the intent necessary to support convictions on separate counts of forgery and uttering. At no point in its discussion did the court intermingle the two apparently separate elements. It reached the conclusion that "the evidence amply support Sullivan's conviction of forgery for the purpose of obtaining money from the United States Treasury, and uttering the forged check with the intent to defraud the United States, knowing the same to be forged", at 187. In declining to read an intent to defraud into the requisite forgery intent, the court impliedly held that the intent elements in forgery and uttering are indeed separate and distinct.

Therefore, the district court's comments to the jury regarding "an intent to defraud" or "an intent to defraud the United States" as a requirement to support a conviction of forgery effectively imposed a higher burden on the government in this case. On at least four separate occasions during the charge to the jury, the court correctly stated that Counts II, III and IV required a finding that the acts were done for the purpose of obtaining a sum of money from the United States or its agents (App. 30, 31, 32 and 33). Further, the jury was instructed that each count of the indictment charged a separate offense and must be considered separately by the jury (App. 29 & 44). Under these circumstances, where the court's charge to the jury may have increased rather than decreased the burden of the government, the appellant certainly suffered no prejudice.

The intent to defraud the United States necessary to support a conviction for uttering need not relate to a prospective pecuniary loss to the government. *Haas v. Henkel,* 216 U.S. 462 (1910). It is sufficient to prove that the defendant intended to interfere with a governmental function, such as paying its employees. *United States v. Dimond,* 445 F.2d 866 (9th Cir., 1971), *Pina v. United States,* 165 F.2d 890 (9th Cir., 1948). By instructing the jury that the intent to defraud the United States may be found if the jury determined that the defendant's acts interfered with a governmental function (App. 36-38), the court stated the law precisely and accurately.

Appellant's contention that the court's instructions were contradictory, inconsistent and misleading with respect to "intent to defraud" as opposed to "intent to defraud the United States", is without foundation. The record clearly reveals that the court specifically mentioned "intent to defraud the United States" on five separate occasions in reference to the uttering count of the indictment (App. 31, 34, 35, 36 & 38). Additionally, in referring to the conspiracy count, the court specifically mentioned "intent to defraud the United States" at five separate points in its charge (App. 39, 40, 41, 52 & 53). When read in its proper context, the court's instruction that "it is not necessary that a defendant know that he is violating a federal law or that he is defrauding the United States" simply means that the defendant need not be aware that the United States would ultimately suffer any monetary or other loss. The instruction is a proper statement of law. *Haugen v. United States,* 153 F.2d 850 (9th Cir., 1946).

When viewed in their entirety, the court's instructions fairly and accurately apprise the jury of the law to be applied to the evidence before them.

POINT III

The evidence is sufficient to sustain the defendant's conviction on Count I (conspiracy) and Count V (uttering and publishing) of the indictment.

Count V of the indictment charges the defendant with uttering and publishing "a forged United States Savings Bond". He challenges the sufficiency of the evidence, charging that while the proof may support a conviction for uttering and publishing a forged endorsement on a United States Savings Bond, it is not sufficient to sustain a conviction for uttering and publishing a forged United States Savings Bond.

His reliance on *Prussian v. United States,* 282 U.S. 675 (1931) is misplaced. There, the defendant was charged with forging an obligation of the United States, a treasury check, by falsely forging the endorsement of the payee on the back of the check, in violation of the statutory predecessor of Title 18, U.S.C., § 471. The Court merely held that the endorsement itself was not an obligation of the United States within the meaning of Section 471. It did, however, uphold the conviction as a forged writing in violation of the precursor of Section 495. Here, appellant was charged with a violation of Section 495 in forging an "other writing". The forgery of endorsements on United States obligations is clearly within the statutory proscription of Section 495. *United States v. Calabro,* 467 F.2d 973 (2nd Cir., 1972); *United States v. Campo,* 414 F.2d 765 (2nd Cir., 1969).

Likewise, *Gesell v. United States,* 1 Fd. 283 (5th Cir., 1924) does not support Halbach's contention with respect to the uttering and publishing count. *Gesell* took the view, later upheld by the Supreme Court in *Prussian v. United*

States, supra, that forging an endorsement on an obligation of the United States was not a violation of the predecessor of Section 471. Significantly, in language cited by appellant in support of his position, Gesell affirms the Government view that the forgery of an endorsement on an obligation of the United States is properly laid under Section 495.

This Court has apparently had only one earlier occasion to consider this issue. The defendant in *United States v. Calabro,* 467 F.2d 973 (2nd Cir., 1972) was charged with conspiring with another to forge and utter bonds and money orders, known by them to have been forged, with intent to defraud the United States. The proof included evidence that the defendants forged endorsements on valid bonds, and that they completed and stamped blank, but genuine, bonds.

Since the Court found the evidence supported a conspiracy to forge the actual bonds themselves, it did not decide the issue of whether the evidence supported a conspiracy to forge the endorsements on the bonds. However, the Court indicated its reluctance to follow the "possibly over-technical view" taken by the Court of Appeals for the Ninth Circuit in *Danielson v. United States,* 321 F.2d 441 (1963), relied heavily upon by appellant. Where as here, the evidence indisputably shows a forgery of some writing on the bonds, coupled with the uttering and publishing of that bond by the defendant with the requisite intent, the Government urges this Court to decline appellant's invitation to hold that the bond has in no way been forged. Clearly, the contrary is true.

Count I of the indictment charges Halbach and Gilmet with conspiring "to defraud the United States *and* to com-

mit offenses against the United States, to wit, to violate Title 18, United States Code, Section 495, by uttering and publishing as true, forged United States Savings Bonds" (emphasis supplied).

In support of his contention that the evidence does not support a finding of guilty on the conspiracy to defraud the United States, Halbach charged that the Government failed to establish that the co-conspirator, Gilmet, entertained the requisite intent to defraud the United States. However, for the reasons cited and authority containing in Point II of this brief, this contention has no merit. "Since the defendant is presumed to have intended to do what he actually did, it follows that his participation in the crime was for the purpose of obtaining money from the United States." *Walker v. United States*, 342 F.2d 22, 27 (5th Cir., 1965). Moreover, Halbach judicially confessed to the unlawful conspiracy (App. 26-27).

The evidence is also sufficient to sustain a finding by the jury that the defendants conspired and agreed together to utter and publish as true forged United States Savings Bonds. Immediately after telling Gilmet he had stolen the bonds, Halbach asked Gilmet to help him in cashing the bonds. Gilmet agreed and actively participated by driving Halbach to a number of banks where attempts were made to cash the bonds. Gilmet was rewarded for his efforts with approximately half the proceeds of the bonds. Again, under the circumstances of this case, this Court should reject the appellant's contention that the proof fails to prove the conspiracy charged, particularly where the defendant has admitted forging the bonds by writing the true payee's endorsement on the back of the bonds.

Conclusion

It is respectfully submitted that for the foregoing reasons the judgment of conviction should be affirmed.

Respectfully submitted,

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RE: U. S. A.
v
Keith Halbach
Docket No. 74-1761

I, Roger J. Grazioplene being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

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16 day of September, 19 74

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 75